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IN THE  
**SUPREME COURT OF THE UNITED STATES**  
OCTOBER TERM, 1975

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NO. 75-1637

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ROBERT L. WADE,

Petitioner,

vs.

WALTER HENKENBERNS,

MICHAEL CARNEY,

and

THE CITY OF CINCINNATI,

Respondents.

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BRIEF FOR RESPONDENT IN OPPOSITION  
TO CERTIORARI

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Respondent, the City of Cincinnati, hereby opposes granting the writ of certiorari in the above-captioned matter.

The opinions below, the basis of this Court's jurisdiction, and several constitutional and statutory provisions involved are set out at pp. 2-3, A1, A5-A8 of the Petition. Additional constitutional and statutory provisions involved are reproduced in the Appendix to this Brief.

## QUESTION PRESENTED

WHETHER THE PETITIONER CAN RECOVER AGAINST THE CITY FOR NEGLIGENCE WHEN THE JURY DECIDED IN FAVOR OF THE INDIVIDUAL POLICE OFFICER DEFENDANT AND THE CITY IS FURTHER PROTECTED BY THE DOCTRINE OF GOVERNMENTAL IMMUNITY WHICH IS RECOGNIZED BY ARTICLE I, SECTION 16, OF THE OHIO CONSTITUTION AND SECURED BY THE ELEVENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

## COUNTER-STATEMENT OF THE CASE

Petitioner, Robert L. Wade, filed a complaint in the Court of Common Pleas, Hamilton County, Ohio, July 28, 1972, naming four police officers and the City of Cincinnati as defendants. Wade claimed that one of the officers had negligently projected a blunt instrument into his left eye, resulting in blindness in that eye.

The city filed an Answer and, thereafter, filed a Motion to Dismiss on the grounds that a municipal corporation cannot be held liable for injuries resulting from acts of members of its police department, even if negligent. The trial court granted the Motion to Dismiss. The case against the individual policeman was tried before a jury. The jury decided in favor of the individual officer, Walter Henkenberns, all other parties having been dismissed by stipulation or upon motion of defendants.

Thereafter, petitioner Wade filed a Notice of Appeal from the decision of the court granting the city's Motion to Dismiss. The decision of the jury on the negligence issue was not appealed. The Court of Appeals, First Ap-

pellate District of Ohio, affirmed the order of the trial court. Petitioner appealed to the Supreme Court of Ohio. The Supreme Court dismissed the appeal.

This cause is now before this Court on the Petition for Certiorari filed by Robert L. Wade.

## REASON FOR DENYING THE WRIT

**The Doctrine Of Governmental Immunity Stems From The Concept Of Sovereign Immunity Recognized By The Eleventh Amendment To The United States Constitution And Article I, Section 16, Of The Ohio Constitution. It Is Not In Conflict With The Constitutional Guarantee Of Equal Protection.**

The Eleventh Amendment of the Constitution reads:

"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced by one of the United States, by citizens of another state, or by citizens or subjects of any foreign state."

Unless the state waives this immunity, it cannot be sued. In *Hans v. Louisiana*, 416 U.S. 232 (1890), the amendment was construed to prohibit suit by a citizen against his own state. Accord: *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

Ohio recognizes the doctrine of sovereign immunity. The second sentence of Section 16, Article I, of the Ohio Constitution, not cited by Petitioner, reads:

"Suits may be brought against the state, in such courts and in such manner as may be provided by law." (Emphasis added.)

Section 16 is not self-executing; statutory consent is a prerequisite to suit. *Krause v. State*, 31 Ohio St. 2d 132, 285

N.E. 2d 736 (1972), appeal dismissed 409 U.S. 1052; *Raudabaugh v. State*, 96 Ohio St. 513, 118 N.E. 102 (1916); *Palumbo v. Industrial Commission*, 140 Ohio St. 54, 42 N.E. 2d 766 (1942); *State, ex rel. Williams v. Glander*, 148 Ohio St. 188, 74 N.E. 2d 82 (1947); *Wolf v. Ohio State University Hospital*, 170 Ohio St. 49, 162 N.E. 2d 475 (1959).

Sovereign immunity under Article I, Section 16 extends to municipal corporations when acting in a governmental function. *Williams v. Columbus*, 33 Ohio St. 2d 75, 294 N.E. 2d 891 (1973); *Nanna v. McArthur*, 44 Ohio App. 2d 22 (1975). Thus, the law is well established in Ohio that a municipal corporation is not liable for the torts of its policemen. *Western College v. City of Cleveland*, 12 Ohio St. 375 (1861); *Bell v. Cincinnati*, 80 Ohio St. 1, 88 N.E. 128 (1909); *Aldrich v. Youngstown*, 106 Ohio St. 342, 140 N.E. 164 (1922). See also *Williams v. Columbus*, 33 Ohio St. 2d 75, 294 N.E. 2d 891 (1973).

Under the Ohio Constitution, only the General Assembly has the authority to waive immunity. *Krause*, supra, considered this very issue when the court was asked to abolish the doctrine judicially. After tracing the history of the defense in Ohio, the court concluded:

"Although the doctrine of governmental immunity was originally judicially created, it is not now subject to judicial re-examination. When the people of Ohio, in 1912, adopted Section 16 of Article I as part of the organic law of this state, they foreclosed to this or any other court the authority to examine the 'soundness' or 'justice' of the concept of governmental immunity. The people of Ohio placed that policy decision in the hands of the General Assembly, and the merits or demerits of granting or withholding consent are to be debated and determined by that body alone. It is not within the province of the judiciary to make that de-

termination. Nor can we make that constitutional provision meaningless. The alternate remedy is by constitutional amendment."

The General Assembly enacted legislation to permit suit against the state in a special court of claims effective January 1, 1975. Chapter 2743, Ohio Revised Code. Significantly the statute specifically excludes municipal corporations from its coverage. Sections 2743.01 (A) and (B) Ohio Revised Code. Municipalities consequently do not lose their governmental immunity under the new legislation. Opinion of the Attorney General, 75 O.A.G. 036.

The doctrine of governmental immunity is not in conflict with equal protection of the law. Not only is it recognized as a valid concept in the constitutions of both the State of Ohio and the Federal Government, but it does not create impermissible classifications. The Ohio Supreme Court considered and rejected petitioner's argument in *Krause*, supra, pp. 145-146. The majority properly reasoned that Section 16 of Article I does not create *any* classifications; it bars all suits against the state absent enabling legislation. The fact that persons injured by non-governmental tort-feasors may have remedies not available to those who sue the state is not unconstitutional discrimination because equal protection permits distinctions based on accepted substantive differences. *Tigner v. Texas*, 310 U.S. 141, 149 (1940). Moreover, the Fourteenth Amendment does not prohibit states from treating different classes of people differently provided the distinctions are consistent with the legitimate goals of the legislation. *Reed v. Reed*, 404 U.S. 71, 75 (1971).

Petitioner cites decisions in other jurisdictions which abolish the defense of governmental immunity on the basis of conflict with equal protection. (Petitioner's Brief, pp. 5-6.) However, Ohio law prevents abrogation by Ohio

courts and the Eleventh Amendment prevents Supreme Court intervention.

### **CONCLUSION**

This case is not the appropriate vehicle for judicial abolition of the doctrine of governmental immunity. The sole issue raised by petitioner is whether the doctrine of governmental immunity shall continue to apply to municipal corporations charged with the commission of torts by their police officers. While petitioner's counsel challenges the public policy for the doctrine and pleads for its abolition, he does not otherwise question its application to the present action.

In this suit the jury held that the individual police officer charged with blinding petitioner in one eye was *not* negligent. If the petitioner cannot recover from the policeman, there is no basis for his recovery against the city. Consequently, the facts of this case are particularly unattractive for the decision petitioner seeks. The Court should deny the writ.

Respectfully submitted,

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### **APPENDIX**

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### **CONSTITUTION OF THE UNITED STATES**

#### **AMENDMENT XI**

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

### **CONSTITUTION OF THE STATE OF OHIO**

#### **Article I, Section 16**

##### **16. Redress in courts.**

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law. (Adopted Sept. 3, 1912).

### **COURT OF CLAIMS**

#### **GENERAL PROVISIONS**

##### **2743.01 Definitions**

As used in Chapter 2743. of the Revised Code:

(A) "State" means the state of Ohio, including, without limitation, its departments, boards, offices, commissions, agencies, institutions, and other instrumentalities. It does not include political subdivisions.

(B) "Political subdivisions" means municipal corporations, townships, villages, counties, school districts, and all other bodies corporate and politic responsible for governmental activities only in geographic areas smaller than that of the state to which the sovereign immunity of the state attaches.